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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. HAROLD BUTTS, JR., Defendant and Appellant.	H033677 (Santa Clara County Super.Ct.No. 211259)

A jury found the defendant, Harold Butts, Jr., guilty on charges stemming from a forcible predawn rape and strangulation in the victim's home. The crimes occurred in 2000. The victim survived to testify against defendant years later, once his identity had been established through forensic means, and he was sentenced to life in prison. He presents state-law and constitutional claims pertaining to the admission of certain evidence and the giving of certain instructions. We find no error under state law or constitutional violations and will affirm the judgment.

PROCEDURAL BACKGROUND

A jury convicted defendant of two counts of forcible rape. (Pen. Code, § 261, subd. (a)(2).)[1] The jury found true enhancement and/or alternative penalty scheme

[1] All further statutory references are to the Penal Code unless otherwise indicated.

allegations that defendant committed the crimes during a burglary, used a deadly weapon, and inflicted great bodily injury on the victim. (§§ 667.61, subds. (a), (c)(1), (d)(4), 12022, subd. (b)(1), 12022.7, subd. (a).) The trial court sentenced defendant to an indeterminate term of 25 years to life in prison consecutive to determinate prison terms totaling 16 years.

FACTS

I. *Prosecution Case*

On August 14, 2000, the victim resided with her father. She was married but her husband was in jail. The victim's father left for work around 3:30 a.m. The victim, now alone, awoke at 5:00 a.m. to discover someone standing in her room who was disguised in a blonde wig and was wearing a hooded sweatshirt.

The intruder was the best friend of the victim's husband, but the victim could not make out the intruder's face and he never spoke during the attack, so she would remain unaware of his identity for several years following the sexual assault that ensued. She could, however, see the man's wrists, which were not covered by black gloves he was wearing, and was able to conclude that he was a dark-skinned African-American.[2] (The victim herself is African-American.)

The man approached the victim's bed and put what felt like a knife to her neck. He climbed on top of her with his legs straddling her waist, put a pillow over her face, and began to strangle her with his hands. Fearing for her life, the victim fought back, damaging her fingernails in the process.

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[2] The victim acknowledged at trial that she later told police that her attacker took off the blonde wig, allowing her to discern that he was bald, though she did not get a good look at his head. She further acknowledged that defendant was not bald around the time of the crimes against her.

The victim stopped struggling as the assailant inserted his penis into her vagina. The man got up, went to the victim's dresser and retrieved some lotion, came back, and inserted his penis into her vagina again. The man also tried to insert it into her anus.[3] The victim's face was covered with the bed covers for the duration of these crimes.

Eventually the man departed. The victim called the police and noticed that her arm was bleeding. At the hospital, she discovered stab wounds or cuts to her arm, neck, and nose. She also had strangulation marks around her neck.

After the incident, the victim moved out of her father's home. In January of 2001, as her father was cleaning out her bedroom, he discovered a bloody knife behind the bed. He donned an unused pair of latex gloves and put the knife in an unused bag. He turned the knife over to the police.

Because defendant was her husband's best friend, she knew him even though she was unable to recognize him during the sexual assault. Despite the fact that the two were acquainted, she never had consensual sex with defendant.

In the latter part of 2007, defendant was identified as the assailant via a match to deoxyribonucleic acid (DNA) evidence retrieved at the crime scene. Before the police told the victim they had identified defendant, the victim had no inkling that defendant could be her assailant. She felt "[b]etrayed" and was left "disappointed, disgusted, frustrated, [and] . . . in shock" by the discovery.

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[3] In addition to the two rape charges, defendant was charged with forcible sexual penetration by a foreign object (§ 289, subds. (a)(1), (*l*)), namely his fingers. The prosecution had information that defendant inserted one or two fingers in the victim's anus, but at trial her testimony was equivocal. She first testified that she could not remember whether he did this or not, nor whether she had told the police he did this. Later in her testimony, after being shown a police report, she was able to recall that he did insert one or two fingers into her anus. The jury acquitted defendant on the penetration by foreign object count.

In November of 2007, with defendant having been identified as a suspect, Detective John Rickert was assigned to the investigation. Rickert recorded some of the conversations he had thereafter with the victim. During one of those conversations he told the victim that defendant was a suspect in her rape. Rickert had the impression that the victim was "[v]ery surprised" to learn that the authorities had identified defendant as the perpetrator.

On November 27, 2007, Detective Rickert arrested defendant and obtained a DNA sample from him. When arrested, defendant was 5 feet 11 inches tall. He had a full head of hair.

A supervising criminalist at the crime laboratory determined that the DNA contained in the sperm cells recovered from the victim matched defendant's profile and that he was the sole source. DNA evidence from fingernail scrapings and other sources also pointed to defendant's commission of the crimes. On the other hand, the crime laboratory could not locate any fingerprints on the knife and no fingerprints were located at the crime scene either. Moreover, some DNA evidence found on the knife excluded defendant and none of it implicated him directly, although the presence of the victim's DNA on the knife implicated him circumstantially.

II. *Defense Case*

Defendant testified on his own behalf. He told jurors that he had consensual sexual intercourse with the victim at the time the victim testified he attacked her. He denied breaking into the victim's home and raping or stabbing her.

Defendant would visit the victim's husband, on which occasions defendant and the victim would talk. She liked to flirt with him. In 1997, defendant encountered the victim at a dance and she danced with him.

Several days before August 14, 2000, the date of the assault, the victim called defendant to ensure that she had the correct phone number for him and told him she would contact him later.

About 1:00 a.m. on August 14, the victim called defendant and invited him to visit. Defendant agreed, stopping at a store first to buy something to drink and condoms. He assumed that the victim was inviting him over for a sexual encounter.

When defendant arrived at the victim's residence around 2:00 a.m., she emerged. Getting inside defendant's vehicle, she asked if they could find a room. Defendant declined because he had not planned to stay with her all night and "wasn't about to spend any money on a room." Defendant suggested they go around the corner and the victim agreed. They parked for about 30 minutes, during which time the victim and defendant had intercourse in the backseat. Defendant wanted to use a condom but did not manage to do so. They agreed to keep their tryst a secret. This was the first and only time that defendant and the victim had sex.[4]

Defendant later learned that the victim had been stabbed and sexually assaulted, but did not contact her. He assumed that the victim's partner would support her and defendant "was more focused on having my child" with another woman, Felicia Caprice Ellis.[5]

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[4] In her testimony, given earlier in the trial, the victim denied calling defendant in the days before August 14, 2000, to make sure that she had his correct telephone number and telling him that she would be calling later. She likewise denied calling defendant at 12:00 or 1:00 on the morning of the incident and asking him to come over to her house for a sexual rendezvous, getting in defendant's car, having consensual sex with defendant in his car in the early morning hours of August 14, and asking defendant to keep the rendezvous a secret.

[5] On cross-examination defendant acknowledged that Detective Rickert asked if he had a relationship with the victim and that he replied no. Rickert asked, " 'So you never had a sexual relationship with her or a dating relationship or anything like that?' " Defendant again said no. He did not tell Rickert that he and the victim had sex in his car. On direct examination, defendant had explained that he answered in the negative because "when he said relationship, I took [it] as being boyfriend-girlfriend." Nevertheless, defendant did not take advantage of opportunities to explain to Rickert why his DNA might be found innocently inside the vagina of a woman who was alleging that defendant

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Ellis provided an alibi in court for defendant. She testified that on August 14, 2000, defendant arrived at her house about 3:00 a.m. and was still there when the sexual assault, according to the victim's testimony, would have occurred.

Ellis further testified that she had known defendant for many years. They had four children, one of whom was born on August 22, 2000, eight days after the sexual assault that the victim reported. Defendant was not the type of person to commit such crimes. He had never been violent or disrespectful toward Ellis or sexually imposed himself on her.

Viewing a photograph of defendant and Ellis taken on August 22, 2000, to memorialize their child's birth, Ellis testified that defendant was not bald, nor was he visibly injured.

A forensic DNA consultant testified as an expert witness for the defense. She had evaluated the prosecution's DNA evidence. She had found flaws in the crime laboratory's analysis of blood on the knife, including its failure to notice that part of the analysis excluded defendant as a DNA contributor. (The prosecutor and the laboratory corrected the errors once the consultant notified her about them.) In addition, the consultant had disagreed with the statistical conclusions from the testing results from the DNA obtained from Doe's fingernails and found a data entry mistake in the laboratory's work.

Duane Dwight Hewitt, an inmate in the county jail at the time of his testimony, testified that he had known defendant since 1982. Hewitt was or had been friends with defendant and the victim's husband. Hewitt testified that the victim had a "flirtatious" bent.

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had raped her. When asked to explain his reticence, defendant testified, "I wasn't sure what they had on me or what the evidence was." Moreover, defendant told Rickert that he was incarcerated when the assault occurred.

DISCUSSION

I. *Admitting Evidence of the Victim's Recorded Statement*

Defendant claims that admitting evidence of an audio-recorded statement the victim made to police was error under state law and violated his constitutional rights to due process of law (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 15) and to confront the witnesses against him (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15).[6] We do not agree.

The prosecution requested that evidence be admitted of the statement the victim made to Detective Rickert in which she expressed shock and indignation on learning that defendant had been identified as her assailant. The prosecutor argued that the statement was admissible under hearsay exceptions permitting the introduction of evidence bearing on the declarant's state of mind and her prior consistent statement.[7] Defense counsel countered that no exception applied.

The trial court disagreed. It decided that despite the rule against admitting hearsay evidence (Evid. Code, § 1200, subds. (a), (b)) the evidence could be admitted under exceptions allowing the jury to hear trustworthy evidence of the victim's state of mind when she made the statement (Evid. Code, §§ 1250, 1252)[8] and as evidence of a prior

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[6] Defendant also invokes article I, section 16, of the California Constitution, but it is not immediately apparent that the guaranties contained in that provision are germane to his arguments.

[7] The prosecutor also argued that the evidence should be admitted under the spontaneous statement exception to the hearsay rule (Evid. Code, § 1240). The trial court did not consider that theory in its ruling, however, and we need not address it here.

[8] Evidence Code section 1250 provides: "(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

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consistent statement (Evid. Code, §§ 791, 1236). Regarding the former, the court noted that defendant was contending that his encounter with the victim was consensual and the indignant or shocked tone of her reaction on learning that defendant had been identified as her assailant was probative in countering that defense and establishing the credibility of her claim of rape. Regarding the latter, the court stated that the defense was trying to show that the victim's testimony was fabricated, making it admissible under Evidence Code section 791, subdivision (b).[9]

Thereafter the jury heard a compact disc recording of a telephone conversation between Detective Rickert and the victim during which the victim, after being apprised that someone finally had been identified as the rapist who had attacked her years before and that individual was defendant, began to have difficulty conversing with Rickert. She said, "I'm sorry, I'm trippin' out right now, because that man has been in our face, and has been in my kid's face, you know, actin' like it's all good." Rickert asked, "Who has?" The victim replied, "Harold," referring to defendant.

"(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or

"(2) The evidence is offered to prove or explain acts or conduct of the declarant.

"(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

Evidence Code section 1252 provides: "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness."

[9] Evidence Code section 791 provides in pertinent part: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

"[¶] . . . [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

We note at the outset that by failing to present his constitutional confrontation-clause claims at trial, defendant has forfeited them. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028, fn. 19.) By contrast, defendant's due process claim, which he raises on appeal as an additional legal consequence of the court's purportedly erroneous ruling—a ruling he objected to on pertinent state-law grounds and preserved for appeal on those grounds—is not forfeited. (*Id*. at p. 990, fn. 5; see *id*. at pp. 997, 1000, 1024, 1029, 1031, 1055.) In such a case, however, "rejection on the merits of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well. No separate constitutional discussion is required in such cases, and we therefore provide none." (*Id*. at p. 990, fn. 5.)

"On appeal, 'an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence . . . .' " (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008.) A trial court abuses its discretion when its ruling falls outside the bounds of reason. (*People v. Benavides* (2005) 35 Cal.4th 69, 88.)

In asserting that the trial court erred in admitting the victim's out-of-court statement expressing indignation and shock on learning of his identity, defendant argues that neither the state-of-mind nor the prior-consistent-statement exceptions to the rule against admitting hearsay evidence applies.

The evidence was admissible, however, to show that the victim's state of mind was not that of someone who had reason to know that defendant's DNA might be found in her body, but rather that of someone who had just been unpleasantly surprised to find that fact out. As defense counsel asserted during closing argument, the defense posited that the victim had a motive for dishonesty because she wanted to cover up the unsavory circumstance that on the night in question the victim engaged in a "sordid sexual encounter in a back seat of a vehicle" belonging to her husband's best friend. The defense's premise was that if a sexual assault occurred on that same night defendant was

not the perpetrator of it. Evidence of the victim's state of mind on learning of defendant's identity was relevant to rebut the defense theory.

Because we conclude that the state-of-mind exception applies in derogation of the rule against admitting hearsay evidence, we need not address the parties' arguments about whether the prior-consistent-statement rule of admissibility applies. (See *United States v. Iaconetti* (2d. Cir 1976) 540 F.2d 574, 577.) It suffices that the evidence was admissible under the state-of-mind exception. Defendant's claim is without merit.

II. *Instructing With CALCRIM No. 318*

Defendant asserts that giving a jury instruction, CALCRIM No. 318, told "the jury to believe [the victim's testimony] and implicitly to disbelieve appellant's." For this reason the trial court's direction "was tantamount to a directed verdict for the prosecution" in that it "eliminated the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt, and deprived appellant of a fair jury trial in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution." At a minimum, defendant further contends, the instruction impermissibly lessened the prosecution's burden of proof.

In accordance with CALCRIM No. 318, the trial court instructed the jury as follows:

"You have heard evidence of [a] statement[s] that a witness made before the trial. If you decide that the witness made (that/those) statement[s], you may use (that/those) statement[s] in two ways: [¶] 1. To evaluate whether the witness's testimony in court is believable; [¶] AND [¶] 2. As evidence that the information in (that/those) earlier statement[s] is true."[10]

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[10] We quote the written version of the instruction. In the oral version of the instruction, the court referred to evidence of statements made "during the trial" instead of before the trial. The trial court stated, however, that it would give the jury copies of the

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The People argue that defendant forfeited his claims regarding CALCRIM No. 318 because his claims amount to assertions that an instruction legally correct in principle nevertheless should have been clarified or amplified. (See *People v. Rogers* (2009) 46 Cal.4th 1136, 1162, fn. 14.) We do not believe that the procedural bar should be imposed here, however. A substantial part of defendant's claim amounts to an implicit assertion that the instruction is infirm on its face, would have been flawed as applied to him under any circumstances, and was not susceptible to being reworked for presentation to the jury. He need not have objected to the giving of the instruction to preserve his claim for review. (§§ 1259, 1469.)

We turn, then, to the merits of defendant's claims.

The statement with which defendant is concerned is the victim's statement expressing shock and indignation on learning that defendant had been identified as the culprit.

Prefatorily, and perfunctorily, defendant claims that CALCRIM No. 318 is intended to be given only when the prior statement is inconsistent, not consistent as was the case here, and that giving the instruction "[i]n that context . . . was utterly inappropriate."

The terms "appropriate" and "inappropriate," though often encountered in legal discourse, are difficult to reify, i.e., in this case reduce to the substance of a claim on appeal. We gather that this may be a claim of error under state law, but defendant presents it too perfunctorily for us to be able to regard it as anything but a preface to his

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written instructions for use during deliberations and the record offers no reason to doubt that it did so. In these circumstances (*People v. Wilson* (2008) 44 Cal.4th 758, 802) "[t]o the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control." (*Id.* at p. 803; accord, *id.* at p. 804.)

essential complaint (which we discuss immediately below), and we deem it inadequately raised to be considered on appeal. (*People v. Marshall* (1990) 50 Cal.3d 907, 945, fn. 9.)

We turn, then, to defendant's fundamental objection to the giving of the instruction, which rests on a premise that the instruction altered the burden of proof in violation of the United States Constitution.

A claim of this type was most recently rejected in *People v. Hudson* (2009) 175 Cal.App.4th 1025. *Hudson* reasoned of CALCRIM No. 318 that "[b]y stating that the jury 'may' use the out-of-court statements, the instruction does not require the jury to credit the earlier statements even while allowing it to do so. [Citation.] Thus, we reject defendant's argument that CALCRIM No. 318 lessens the prosecution's standard of proof by compelling the jury to accept the out-of-court statements as true." (*Hudson, supra,* at p. 1028.)

Defendant argues that "Since there was no doubt that [the victim] made the prior statement, as it was recorded and the CD was played for the jury [citation], the instruction told the jurors that [they] could conclude that the statement was true. As her prior statement was consistent with her testimony that she had not had consensual sex with appellant and that she was surprised his DNA was found inside of her was true, the instruction effectively told the jurors that Doe's testimony was true as well and, conversely, that appellant's testimony was not true." One need only reread the instructional language, however, to see the inaccuracy of that assertion. (See *People v. Golde* (2008) 163 Cal.App.4th 101, 119-120 ["CALCRIM No. 318 tells the jurors how they may use the prior statements '[i]f [they] decide that the witness made those statements. . . .' Thus, the 'may' comes into play only after the jurors have found the statements were made. The instruction does not allow the jurors to ignore evidence"].) Moreover, CALCRIM No. 220 told the jury that it could find defendant guilty only if it concluded beyond a reasonable doubt that he committed the crimes in light of "all the evidence." This vitiates any suggestion that a constitutionally implicating reasonable

likelihood exists (see *People v. Ayala* (2000) 24 Cal.4th 243, 289) that the jury would believe CALCRIM No. 318 told it to abdicate its fact-finding role. "Because the jury received CALCRIM No. 220 and other pertinent instructions . . . [v]iewed in context, the instruction [CALCRIM No. 318] provided proper guidance about how the jury may use witness testimony, and did not encourage it to neglect or ignore the testimony." (*People v. Felix* (2008) 160 Cal.App.4th 849, 859.) For the reasons stated, we reject defendant's claims.[11]

III. *Instructing With CALCRIM No. 362*

In a challenge to CALCRIM No. 362, defendant asserts that the instruction, evidently both on its face and as applied to him, violates due process principles (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 15).[12]

The prosecution sought to have the trial court instruct the jury with CALCRIM No. 362 because the prosecutor viewed the evidence as allowing the jury to conclude that defendant lied to Detective Rickert when he told him that he had never had any sexual contact with the victim, whereas in court defendant testified that the two did have a consensual sexual encounter. Defendant objected that the instruction was inapplicable to the evidence the jury had heard. The court took the matter under advisement. As the court was reading the instructions it informed counsel at sidebar that it was going to give CALCRIM No. 362 and thereupon so instructed the jury.

Accordingly, the jurors were given a version of CALCRIM No. 362 that informed them: "If the defendant made a false or misleading statement relating to the charged

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[11] This includes defendant's claim that a structural error occurred that requires reversal regardless of prejudice. Because we conclude that there was no error, a fortiori there was no possibility of any structural error.

[12] Defendant also invokes the Sixth Amendment to the United States Constitution and article I, section 16, of the California Constitution, but again it is not immediately apparent that the guaranties contained in those provisions are germane to his arguments.

crime, knowing the statement was false or intending to mislead, that conduct may show (he/she) was aware of (his/her) guilt of the crime and you may consider it in determining (his/her) guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

The People argue in effect that this claim presents a nonissue because the California Supreme Court has affirmed in a dozen decisions the validity of the predecessor to CALCRIM No. 362, CALJIC No. 2.03.[13] The People are correct that the high court has repeatedly affirmed the validity of CALJIC No. 2.03. (*People v. McWhorter* (2009) 47 Cal.4th 318, 377; *People v. Richardson* (2008) 43 Cal.4th 959, 1019.) Defendant's quarrel, however, is not with CALJIC No. 2.03—he so states explicitly—but with CALCRIM No. 362, so the People's observation is inapposite.

We return, then, to defendant's claims regarding CALCRIM No. 362. The legal standard for a claim of this type presents a high barrier to defendant's challenge. With regard to criminal trials, "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is ' "whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process." ' [Citations.] ' "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." ' [Citations.] If the charge as a whole is ambiguous, the question is whether there is a ' "reasonable

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[13] The CALJIC No. 2.03 pattern instruction informs the trier of fact: "If you find that before this trial [a] [the] defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which [he] [she] is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' " (*Middleton v. McNeil* (2004) 541 U.S. 433, 437.)

Defendant reasons as follows: CALCRIM No. 362 is infirm "first, because its language presumes the defendant's guilt, and second, because it is argumentative in favor of the prosecution." The vice of the instruction, in his view, is that it (1) presumes his guilt and (2) instructs the jury that if he made a false statement it is proof that he was aware of his guilt. "The language in CALCRIM 362 stating that a false statement may show that the defendant 'was aware of his guilt' presumes the existence of the defendant's guilt, and makes the false statement relevant only to the question whether he was aware of that guilt. The culprit is the word 'aware.' It is defined as 'knowing that something exists, or having knowledge or experience of a particular thing' or 'having knowledge or cognizance.' 'Aware implies knowledge gained through one's own perceptions or by means of information.' One cannot perceive or have knowledge of things that do not exist. For example, one could not say that a person is aware of the rain unless it is raining, or that he is aware of his illness unless he is ill. The phrase 'he was aware of his guilt' leaves no room for a conclusion that he was not guilty." (Fns. omitted.)

Defendant presents interesting observations concerning the philosophy of language, though it is possible to be aware of, i.e., perceive or know about, things whose existence is not proven or that do not exist. We are aware of and know about Atlantis, the Bermuda Triangle, and Greek mythological creatures, for example.

As for defendant's fundamental arguments—that the instruction wrongfully tells jurors that a false statement is proof of guilt and that the instruction is argumentative—we do not agree with them. The instruction provides in pertinent part, "If the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show (he/she) was aware of (his/her) guilt of the crime and you may consider it in determining (his/her) guilt." In

our view, the instruction, read in light of all of the other instructions, tells the jury that if it concludes defendant lied at one point it "may show" consciousness of guilt, not necessarily that it does show it. Nor do we find any basis to agree with defendant that the instruction presumes his guilt. Not only does it not do so, but CALCRIM No. 220, the standard beyond-a-reasonable-doubt instruction, instructed the jury that it could find defendant guilty only if it concluded beyond a reasonable doubt that he committed the crimes. The instruction's language was neutral, neither presuming guilt, nor equating the making of a false statement with awareness of guilt, nor being unduly argumentative. Regarding the latter point, it suffices to note that *People v. Kelly* (1992) 1 Cal.4th 495, 531-532, held that CALJIC No. 2.03, which is very similar to CALCRIM No. 362, is not an improper pinpoint instruction. Certainly we do not find the whole charge ambiguous, and even if we did, we would still not find a reasonable likelihood that the jury applied CALCRIM No. 362 in a way that violated the Constitution. (*Middleton v. McNeil*, *supra*, 541 U.S. at p. 437.)

DISPOSITION

The judgment is affirmed.

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Duffy, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Mihara, J.